Filed 3/30/05 In re Justin J. CA1/2

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

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| In re JUSTIN J., a Person Coming Under the Juvenile Court Law. | |
| THE PEOPLE,<br>Plaintiff and Respondent,<br>v.<br>JUSTIN J.,<br>Defendant and Appellant. | A105330<br>(Alameda County<br>Super. Ct. No. J187085-02) |

Justin J., a minor, challenges the finding that he committed a robbery (Pen. Code, § 211)[1] and that he personally used a firearm (§ 12022.53, subd. (b)(1)). He claims that substantial evidence does not support the findings and that the trial court should have granted his motion to suppress the evidence found in the automobile. We are unpersuaded by his arguments and affirm the judgment.

## BACKGROUND

A petition filed on March 21, 2003, alleged that Justin, who was born in November 1986, came within the provisions of Welfare and Institutions Code section 602. The petition charged him with three counts of selling cocaine base (Health & Saf.

[1] All further unspecified code sections refer to the Penal Code.

Code, § 11352, subd. (a)) on three different dates. On April 2, 2003, an amendment to the petition was filed, adding an additional count of selling cocaine base (*ibid.*) and one count of possession of cocaine base for sale (Health & Saf. Code, § 11351.5).

On August 1, 2003, a subsequent petition charged Justin with escape from a county camp (Welf. & Inst. Code, § 871). This petition was amended on August 15, 2003, to add charges that on August 11, 2003, Justin robbed Devon C. (§ 211) with the use of a firearm (§ 12022.53, subd. (b)(1)), and attempted to rob Kevin C. with the personal use of a firearm (§§ 664, 211).

On November 12, 2003, Justin moved pursuant to Welfare and Institutions Code section 700.1 to suppress evidence found in an automobile. The court heard this motion at the combined jurisdictional and suppression hearing, which began on December 1, 2003. At the hearing, the court heard evidence regarding the events on August 11, 2003. Devon testified that he was riding his bicycle shortly after 3:00 p.m. on August 11 in Hayward when a green Buick Regal drove up to him; two people were in the car. Justin, the driver of the Buick, told Devon to empty his pockets. Devon had seen Justin at the BART station on several occasions and knew him as "Hollywood." After Devon responded that he had nothing in his pockets, Justin took out a gun from beneath his black leather jacket. The passenger in the Buick, Joseph, searched Devon's pockets and removed $17 and Devon's keys. Justin then drove to Devon's home, parking in the driveway at the back of the house. Devon went to a friend's house, remaining there until he saw the Buick leave the driveway at his home.

Devon's twin brother, Kevin, and another person, Mark, were in the rear of Devon's home repairing a car when the Buick arrived. Justin pulled a gun and searched Kevin's pockets. Justin removed the contents of Kevin's pockets and then left in the Buick.

At 3:15 p.m., Deputy Mark Flores (Flores) was responding to the report of the robberies when he spotted two persons on foot who matched the description of the

suspects. When Flores parked and got out of his car, Justin and Joseph fled with Flores and his partner in pursuit. Flores captured Joseph, but Justin escaped. 12/15 12)~

That same day, Devon, Kevin, and Mark were taken to the police station and each identified Joseph as the passenger in the Buick. However, at trial, Kevin and Devon testified that Joseph was not the passenger.

About one-half hour after the incident involving Devon, Deputy Scott Miller found the Buick Regal parked a short distance from where Flores first saw Justin and Joseph on foot. Devon, Kevin, and Mark all positively identified the car as the one driven by the robbers. A subsequent search of the car uncovered a loaded and cocked Taurus .357 revolver, which Kevin identified as the robbery weapon. Also in the car was a stereo store receipt dated August 1, 2003, with Justin's name and a black jacket. The car was owned by Justin's grandmother.

On August 13, two days after the incident, Devon selected Justin's photograph from a photographic spread. He identified him as "Hollywood," and the driver of the Buick Regal. Flores selected Justin's photograph as the person who fled from him two days earlier. Flores recognized Justin in court as the person he had seen fleeing on August 11.

At trial, Mark testified that the person in the courtroom, Justin, could be the driver, but he was not sure. In court, Devon denied that Justin was the driver. Specifically, when asked by defense counsel whether the person in court and his client was "much lighter skinned than the person that robbed" him, Devon responded, "Yes." Devon also indicated that the person in court was smaller than the driver and the driver's face was wider at the top. Devon admitted that he had identified someone he called "Hollywood" from the photographic lineup, but at trial he claimed the photograph was different than the person sitting in the courtroom. Devon admitted that he did not want to testify and that he was scared; he did not want to be there.

At trial, Kevin also denied that Justin was the driver. Kevin stated that he was currently in custody for grand theft automobile charges. The court noted that he was being deliberately evasive when answering questions at the trial.

Justin's grandmother testified that Justin had called her on the evening of August 13 and agreed to return to the county camp. She met him the following day and was driving him to juvenile hall when the police stopped the car and arrested him. She stated that she had not given Justin permission to drive the car. When the police returned the car to her she noticed that the ignition had been "hot-wired."

On December 18, 2003, the court denied Justin's motion pursuant to Welfare and Institutions Code section 700.1 to suppress evidence found in the Buick. The court ruled that Justin did not have any "standing, technically" to challenge the search of the car. The court found there was sufficient evidence that Justin was the driver of the Buick when Devon was robbed. It therefore found that Justin had committed robbery with the personal use of a firearm. The court ruled there was insufficient evidence to sustain the attempted robbery of Kevin. The prosecution did not pursue the escape charge, and the court dismissed this charge.

On January 5, 2004, Justin admitted one count of the charge of possession of cocaine base for sale. The other four counts for sale of cocaine base were dismissed "with facts open."

On January 9, 2004, the court continued Justin as a ward of the court and committed him to the California Youth Authority for a maximum period of 16 years 4 months, based on a term of 5 years for the robbery, 10 years for the personal firearm use enhancement, and 16 months for the possession for sale of cocaine base.

Justin filed a timely notice of appeal.

## DISCUSSION

### I. *Robbery*

Justin contends that insufficient evidence supported the true finding that he robbed Devon with the personal use of a firearm. " 'When the sufficiency of the evidence is

challenged on appeal, the court must review the whole record in the light most favorable to the judgment to determine whether it contains substantial evidence—i.e., evidence that is credible and of solid value—from which a rational trier of fact could have found the defendant guilty beyond a reasonable doubt.' [Citations.]" (*People v. Jennings* (1991) 53 Cal.3d 334, 364.) The court must look at the record as a whole, not just the evidence in support of the finding. (See *People v. Reyes* (1974) 12 Cal.3d 486, 493.) If the findings are reasonable and supported by the evidence, reversal is not warranted because a contrary finding might also be reasonable. (*People v. Redmond* (1969) 71 Cal.2d 745, 755.)

Justin does not dispute that Devon was riding his bicycle when two people in a Buick confronted him. He also does not contest that the driver displayed a handgun while the passenger went through Devon's pockets. Rather, he claims there was insufficient evidence that he was the driver. In particular, he cites the testimony of Devon and Kevin that he was not the driver of the car. In addition, he emphasizes that the revolver that was recovered had no visible fingerprints on it and the absence of his fingerprints represented a "conspicuous lack of incriminatory evidence which normally would be forthcoming . . . ." (*People v. Reyes, supra,* 12 Cal.3d at p. 500). He claims that the robbery conviction cannot be sustained because there is no direct identification testimony and that the circumstantial evidence was inadequate to establish him as the perpetrator. (See *People v. Morris* (1988) 46 Cal.3d 1, 21; *People v. Hall* (1964) 62 Cal.2d 104, 112.)

Substantial evidence, however, did support the court's ruling. The court had good reason to be skeptical of Devon's testimony at trial, which contradicted his previous identification of Justin as the driver and robber. Devon admitted at trial that he did not want to be a witness and was afraid for his family. Indeed, the court noted the change in Devon's testimony and the fact that he was nervous and did not want to testify. The court considered the evidence that Devon and Kevin had both identified Justin as the driver from a photographic lineup shortly after the incident. An out-of-court

identification is sufficient to prove guilt and has greater probative value than an in-court identification. (*People v. Cuevas* (1995) 12 Cal.4th 252, 265-267.)

In addition to the identification of Justin in a photographic lineup, Flores identified Justin from a photographic lineup as the person who had fled from him a short time after, and within the vicinity of, the robbery. Flores also made an in-court identification. Other evidence included the testimony of Justin's grandmother that the Buick Regal was her car and that it had been "hot-wired." A receipt with Kevin's name was in the car; the receipt was dated August 1, 2003, after Justin had escaped from county camp.

This evidence was more than ample to support the finding that Justin robbed Devon and used a firearm.

## II. *Motion to Suppress*

Justin contends the court should have granted his motion to suppress the evidence (Welf. & Inst. Code, § 700.1) recovered from the Buick Regal, including a revolver and a receipt with his name on it. The Buick was searched without a warrant and Justin contends that his Fourth Amendment rights were violated.

A Welfare and Institutions Code section 700.1 proceeding, the juvenile court counterpart to the adult motion pursuant to section 1538.5, is distinct and separate from the trial phase of a juvenile case having a different purpose with a different burden of proof. (*People v. Superior Court* (1971) 18 Cal.App.3d 316, 321.) This proceeding was established to efficiently dispose of questions involving suppression of evidence before trial with only one appellate review. (See *People v. Belleci* (1979) 24 Cal.3d 879, 884.)

We uphold the lower court's findings, whether express or implied, if supported by substantial evidence. (E.g., *People v. Leyba* (1981) 29 Cal.3d 591, 596-597.) Whether the facts as found support the trial court's ruling is reviewed de novo. (*People v. Celis* (2004) 33 Cal.4th 667, 679.) Whether Justin had a reasonable expectation of privacy in the automobile is a question of law reviewed de novo. (*People v. McPeters* (1992) 2 Cal.4th 1148, 1172.)

The trial court denied Justin's motion to suppress on the basis that he was using the car without permission and had no possessory interest in it and therefore he had no standing to challenge the search as being unconstitutional. Standing to challenge a search requires that the individual challenging the search have a reasonable expectation of privacy in the property searched (*Rakas v. Illinois* (1978) 439 U.S. 128, 143), and that the defendant manifest a subjective expectation of privacy in the property searched (*California v. Greenwood* (1988) 486 U.S. 35, 39). The Fourth Amendment right to be free from unreasonable searches is a personal right, which may not be asserted vicariously. (*Rakas, supra,* at p. 133.) The defendant moving to suppress evidence has the burden of proving that his or her *own* Fourth Amendment rights were violated by the challenged search or seizure. (*Id.* at pp. 130-131, fn. 1.) We conclude Justin has not shown he had a reasonable expectation of privacy in the automobile searched. (See *People v. Ayala* (2000) 23 Cal.4th 225, 255, citing *Minnesota v. Carter* (1998) 525 U.S. 83, 88.)

Justin concedes that he did not have his grandmother's permission to use the Buick Regal, but he maintains that does not bar him from having standing to complain of an unreasonable search of the car under the Fourth Amendment of the United States Constitution. He asserts that the Fourth Amendment applies whenever a person has a legitimate expectation of privacy, and a person may have an expectation of privacy even when the person has no right to be in that place. (*People v. Thompson* (1996) 43 Cal.App.4th 1265, 1268-1269 (*Thompson*) [standing to challenge search of boarding house where defendant was staying despite landlord's restraining order directing him to stay away from boarding house].) Justin argues that society would expect the government to refrain from breaking into a locked automobile lawfully parked on a public street and that Justin, as a family member of the owner of the car, had an expectation of privacy. He maintains that, as in the boardinghouse tenant in *Thompson,* he had a legal right to expect any personal property stored inside the car would be free from government invasion.

Although Justin relies on *Thompson, supra,* 43 Cal.App.3d 1265, this case is inapplicable. The court in *Thompson* explained that it was considering the following: "The pertinent factors to consider include whether the defendant has a property or possessory interest in the thing seized or the place searched; whether he has the right to exclude others from that place; whether he has exhibited a subjective expectation that the place would remain free from governmental invasion; whether he took normal precautions to maintain his privacy; and whether he was legitimately on the premises." (*Id.* at pp. 1269-1270.) In *Thompson,* police searched a boarding house room, rented by the defendant. The defendant had not been lawfully evicted, and the court held that the restraining order did not extinguish the defendant's possessory rights and therefore his expectation of privacy. (*Id.* at pp. 11270-1271.) In contrast, here, Justin had no property or possessory right to enter or use the Buick, absent his grandmother's permission; his grandmother testified that she had not given him permission. Further, he did not take reasonable precautions to maintain his privacy or exhibit a subjective expectation of privacy when he abandoned the vehicle.

The law is clear that a defendant who has stolen a car and used it in a robbery does not have standing to object to a search of the car. (E.g., *People v. Satz* (1998) 61 Cal.App.4th 322, 325; *United States Ex Rel. Laws v. Yeager* (3rd Cir. 1971) 448 F.2d 74, 85.) Here, as the lower court pointed out, the evidence did not establish that the Buick was stolen because that was a hearsay statement. Courts have concluded that whether the driver of a car has the reasonable expectation of privacy necessary to show Fourth Amendment standing is a fact-bound question dependent on the strength of the defendant's interest in the car and the nature of the defendant's control over it; ownership is not necessary. (Compare *U S. v. Cooper* (11th Cir. 1998) 133 F.3d 1394, 1398-1399 [driver of rental car whose contract to rent the car had expired four days before the search had a reasonable expectation of privacy in car because he could have extended the contract with a simple phone call]; *U. S. v. Angulo-Fernandez* (10th Cir. 1995) 53 F.3d 1177, 1179 [driver with registration papers in name of person from whom he claimed to

have borrowed car had standing]; *U. S. v. Rubio-Rivera* (10th Cir. 1990) 917 F.2d 1271, 1275 [permission from owner to use vehicle supported privacy expectation therein]; *U.S. v. Garcia* (7th Cir. 1990) 897 F.2d 1413, 1417-1418 [driver using vehicle with permission of absent owner had reasonable expectation of privacy therein]; with *U. S. v. Padilla* (9th Cir. 1997) 111 F.3d 685, 687 [defendants lacked standing to object to search of car in which they had only temporary "bailment interest"]; *U. S. v. Riazco* (5th Cir. 1996) 91 F.3d 752, 755 [defendant lacked standing to object to search of rental car when defendant's name not on rental agreement, rental agreement had expired, and defendant did not have permission to drive car from person who rented car]; *U. S. v. Ponce* (2nd Cir. 1991) 947 F.2d 646 [defendant must show legitimate basis for possessing car, such as permission from the car owner, to have standing].)

We agree with the trial court's finding that Justin had no expectation of privacy in the Buick Regal. It is undisputed that Justin did not have permission to drive the Buick. At the time the vehicle was seized, Justin did not have constructive possession of it and did not have the keys to it. Justin did not have a contract giving him a right to use the vehicle. Justin argues that simply because he had permission in the past to use the Buick and that he is related to the owner, his grandmother, he had an expectation of privacy, and he cites a number of out of state cases (e.g., *In re J.R.M.* (Mo. 1972) 487 S.W.2d 502, 509 [minor had standing to challenge search of his father's car when used the family car regularly and lived with parents].) We disagree. Justin ignores the most critical factors: no property or possessory interest in the car and use without permission or pursuant to contract. In addition, as he concedes, he did not use the car on a regular basis. Accordingly, he had no expectation of privacy and the court properly denied his motion to suppress based on an illegal search of the Buick Regal.[2]

[2] Since we are affirming on this basis, we need not consider the People's additional argument that the automobile search exception applied.

### III. *Court's Decision Citing Prosecutor's Argument*

Justin contends the court erred because it based its decision on the prosecutor's comments, not the evidence. Justin cites the following statements made by the court: "And [Devon] makes a number of statements, and I have to believe what the prosecutor said on this. He didn't want to make an identification because he seemed scared. And he stated, 'I'm scared. I don't want to be here.' And he said, 'I told you I didn't want to testify.' You were afraid for your mom and retaliation. And he said that he was. He said, 'I told you I didn't want to testify.' And it didn't go beyond that. But he didn't answer the question about retaliation, but he did respond that he didn't want to testify—he seemed nervous.

"And when he came to court, he then began to step away from everything he said before. When he went in to make the identification, he identified the minor. And the description from the officer that conducted the lineup, he didn't have any problem doing that. When he came here, he had a total demeanor [*sic*]. He seemed afraid, and he stated he was afraid. I believe he identified, and possibly so, the driver of Justin . . . as the driver of the car in respect to the robbery."

Justin maintains that Devon admitted that he did not want to testify and that he was scared but he did not assert he was afraid of retaliation against his family. Thus, Justin argues that the court improperly accepted the prosecutor's insinuation that Devon was afraid for his family. He argues that the reviewing court may review the means used by the trial court to reach a conclusion. (*Clothesrigger, Inc. v. GTE Corp.* (1987) 191 Cal.App.3d 605, 616.)

The People respond that Justin never objected to this alleged misstatement of the evidence and therefore has waived raising this issue on appeal. (See *People v. Vera* (1997) 15 Cal.4th 269, 275.) In addition, "[o]rdinarily statements made by the trial court as to its reasoning are not reviewable. An exception to this general rule exists when the court's comments unambiguously disclose that its basic ruling embodied or was based on a misunderstanding of the relevant law." (*In re Jerry R.* (1994) 29 Cal.App.4th 1432,

1440.) Here, the statements attributed to Devon that he was afraid there would be retaliation against his family relate to the court's memory of the facts and there is absolutely no evidence that the court misunderstood the relevant law.

This issue is not reviewable but, even if it were, Justin's contention has no merit. The court properly noticed that Devon was nervous while testifying and this was a proper consideration of the court. Thus, it was Devon's demeanor, his admission that he did not want to testify, and the reliability of his earlier identification that the court properly considered when making its decision. The court also referred to other evidence discussed *ante,* such as Flores's identification of Justin. Consequently, the extent to which the court may have incorrectly considered that Devon said he was afraid of retaliation against his family was not significant to its determination that Justin was the driver and robbed Devon.

**DISPOSITION**

The judgment is affirmed.

_____
Lambden, J.

We concur:

_____
Kline, P.J.

_____
Ruvolo, J.